

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

INSTITUTE OF CETACEAN  
RESEARCH, et al.,

CASE NO. C11-2043JLR

## ORDER

Plaintiffs,

V.

SEA SHEPHERD  
CONSERVATION SOCIETY, et al.,

## Defendants.

## I. INTRODUCTION

17 Before the court is Defendants Sea Shepherd Conservation Society (“SSCS”) and  
18 Paul Watson’s (collectively, “Defendants”) motion to clarify the scope of the permanent  
19 injunction. (Mot. (Dkt. # 352); *see also* Perm. Inj. (Dkt. # 346).) Plaintiffs The Institute  
20 of Cetacean Research (“the Institute”), Kyodo Senpaku Kaisha, Ltd., and Tomoyuki  
21 Ogawa (collectively, “Plaintiffs”) oppose the motion as unripe and, even if ripe, lacking  
22 merit. (Resp. (Dkt. # 354).) The court has considered the parties’ briefing, the relevant

1 portions of the record, and the applicable law. Considering itself fully advised,<sup>1</sup> the court  
 2 GRANTS in part and DENIES in part the motion and clarifies the injunction as follows.

3 **II. BACKGROUND**

4 Unlike *Moby Dick*, this whaling epic will apparently never end. On August 22,  
 5 2016, following nearly five years of litigation, the parties jointly moved for the entry of a  
 6 negotiated permanent injunction that resolved all live claims. (Stip. Inj. (Dkt. # 343);  
 7 Prop. Order (Dkt. # 344).) The next day, the court entered the parties' negotiated  
 8 permanent injunction and terminated this case. (Perm. Inj. at 1-3.) Pursuant to the  
 9 parties' stipulated motion, the court ordered:

10 Defendants and any party acting in concert with them are permanently  
 11 enjoined from physically attacking any vessel engaged by Plaintiffs in the  
 12 Southern Ocean or from navigating in a manner that is likely to endanger the  
 13 safe navigation of any such vessel. In no event shall Defendants or any party  
 14 acting in concert with them approach Plaintiffs any closer than 500 yards  
 15 when Defendants are navigating on the open sea.

16 Defendants and any party acting in concert with them are also permanently  
 17 enjoined from providing any money or property for the purposes of funding  
 18 any physical attacks on any vessel engaged by Plaintiffs in the Southern  
 19 Ocean or any person on any such vessel, any navigation in a manner that is  
 20 likely to endanger the safe navigation of any such vessel, or any approach of  
 21 any such vessel closer than 500 yards in the open sea, including through any  
 22 entity that is a part of the worldwide "Sea Shepherd" movement and/or uses  
 or has used some version of the "Sea Shepherd" name.

23 On the stipulation of the parties, Defendants are also permanently enjoined  
 24 from expending, directly or indirectly, any part of the settlement  
 25 consideration to be paid to Sea Shepherd Conservation Society in the  
 26 settlement of this action to fund acts enjoined herein as against not only  
 27 Plaintiffs but those same acts as against third parties anywhere in the world.

1 (Id. at 2.) The court also dismissed all live claims and counterclaims, ordered each party  
2 to bear its own costs and attorneys' fees, ordered the parties to provide notice of the  
3 injunction to the Ninth Circuit Court of Appeals, and retained jurisdiction to enforce  
4 compliance with the permanent injunction. (Id. at 3.)

5 Defendants interpret Plaintiffs' recent actions to suggest an actual or imminent  
6 "attempt to enforce an interpretation of the Permanent Injunction that goes far beyond its  
7 terms." (Mot. at 1.) On October 12, 2016, Plaintiffs sent a letter to third-party PayPal,  
8 Inc., that suggests PayPal may be held in contempt for "acting in concert with"  
9 Defendants. (Davis Decl. (Dkt. # 353) ¶ 2, Ex. 1 at 2.) In response, PayPal indicated that  
10 it had frozen three accounts that it determined were related to Defendants. (Id. ¶ 3, Ex. 2  
11 at 1.) Plaintiffs have submitted similar letters to other financial institutions. (Id. ¶ 1.) In  
12 addition, Defendants sought confirmation from Plaintiffs that certain activities do not  
13 violate the injunction. (Id. ¶ 5, Ex. 4 at 1-2.) Plaintiffs did not directly respond to  
14 Defendants' requests for clarification, but instead indicated that they intend to "wait and  
15 see what unfolds." (Id. ¶ 6, Ex. 5 at 2.) Plaintiffs clarified that they "intend to take all  
16 steps necessary to ensure full and faithful compliance with the letter and spirit of the"  
17 injunction. (Id.)

18 In prior proceedings, the Ninth Circuit sanctioned Defendants for violating the  
19 preliminary injunction in part because they self-servingly interpreted the injunction  
20 without "seek[ing] clarification of their obligations," despite having "every opportunity"  
21 to do so. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y (Cetacean II)*,  
22 774 F.3d 935, 954 (9th Cir. 2014). In light of the Ninth Circuit's admonishment and

1 Plaintiffs' unwillingness to clarify their position on Defendants' planned actions,  
2 Defendants now ask the court to clarify the scope of the injunction. (*See Mot.*)  
3 Specifically, Defendants ask the court to confirm that the following actions "would not  
4 constitute, or be evidence of, a violation" of the injunction:

- 5 1. Discussing the actions of foreign Sea Shepherd entities<sup>2</sup> on social  
media and other public platforms;
- 6 2. Communicating with foreign Sea Shepherd entities, as long as  
Defendants do not thus direct, incite, or control enjoined conduct;
- 7 3. Partnering with foreign Sea Shepherd entities on campaigns,  
income-generating activities and other projects unrelated to, and kept  
separate from, Southern Ocean whale-protection campaigns;
- 8 4. The processing of routine financial transactions by SSCS's financial  
partners; and
- 9 5. Acts that occurred prior to the entry of the Permanent Injunction,  
including SSCS's 2013 grant of equipment on the Steve Irwin to a  
foreign Sea Shepherd entity.

13 (Mot. at 2.)

### 14 III. ANALYSIS

#### 15 A. Legal Standard

16 Federal Rule of Civil Procedure 65(d) requires every injunctive order to "state its  
17 terms specifically" and "describe in reasonable detail—and not by referring to the  
18 complaint or other document—the act or acts restrained or required." Fed. R. Civ. P.  
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21 <sup>2</sup> The court refers to the defendant in this action as "SSCS," whereas it refers to SSCS's  
22 foreign counterparts—which are non-parties—as "foreign Sea Shepherd entities." (*See Dkt.*)  
The injunction refers to foreign Sea Shepherd entities both implicitly and explicitly. (*See Perm.*  
Inj. at 2.)

1 65(d)(1)(B)-(C). “The Supreme Court teaches that when questions arise as to the  
 2 interpretation or application of an injunction order, a party should seek clarification or  
 3 modification from the issuing court, rather than risk disobedience and contempt.”  
 4 *Regents of the Univ. of Cal. v. Aisen*, No. 15-cv-1766-BEN (BLM), 2016 WL 4681177,  
 5 at \*1 (S.D. Cal. Sept. 7, 2016) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187,  
 6 192 (1949); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945)); *see also Regal*, 324  
 7 U.S. at 15 (“[C]ourts no less than parties desire to avoid unwitting contempts . . .”);  
 8 *Cetacean II*, 774 F.3d at 954 (rejecting Defendants’ “self-serving interpretation of their  
 9 obligations” because they had failed to seek clarification of their obligations despite  
 10 having “every opportunity” to do so). The scope of the parties’ stipulated injunction  
 11 “must be discerned within its four corners, and not by reference to what might satisfy the  
 12 purposes of one of the parties to it.” *United States v. Armour & Co.*, 402 U.S. 673, 682  
 13 (1971).

14 **B. What Conduct Constitutes “Evidence of” a Violation of the Injunction**

15 The court first addresses Defendants’ request to determine whether the five listed  
 16 acts might constitute “evidence of” a violation of the injunction. (Mot. at 2.) The  
 17 panoply of ways in which a fact may be relevant “evidence of” a violation of the  
 18 injunction evades prediction at this time.<sup>3</sup> *See* Fed. R. Evid. 401. As a result, any

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 21 <sup>3</sup> For instance, Defendants first raise “[d]iscussing the actions of [f]oreign Sea Shepherd  
 22 [e]ntities on social media and other public platforms.” (Mot. at 2.) Depending on the nature of  
 the discussion’s content and other context, that conversation could be irrelevant or it could  
 provide some “evidence of” improper funding or other actions that violate the injunction. (*Id.*;  
*see* Perm. Inj. at 2.)

1 attempt to clarify the injunction in that regard risks inadvertently reshaping the injunction  
2 or muddying, rather than clarifying, its terms. Accordingly, this aspect of Defendants'  
3 motion is too context-dependent for the court's clarification to aid the parties in  
4 "avoid[ing] unwitting contempts," *Regal*, 324 U.S. at 15, and the court denies that aspect  
5 of the motion.

6 **C. What Conduct "Violat[es]" the Injunction**

7 Defendants also ask the court to confirm that the five specified actions do not  
8 "violate" the injunction. (Mot. at 2.) Although most of the actions lack a sufficiently  
9 concrete context for the court to provide meaningful clarification, the court addresses  
10 each action that Defendants identify in turn.

11 1. "Discussing the actions of [f]oreign Sea Shepherd [e]ntities on social media  
12 and other public platforms"

13 Defendants fail to show a sufficiently concrete dispute regarding this action.

14 Defendants ask the court to clarify that although speech may violate the injunction if it  
15 incites or directs violations thereof, speech that merely reports on or discusses foreign  
16 Sea Shepherd entities does not violate the injunction. (Mot. at 7-9.) Plaintiffs respond  
17 that "whether any particular conduct or words cross the line will depend on context."  
18 (Resp. at 4.) For example, Plaintiffs argue that reporting the coordinates of Plaintiffs'  
19 fleet could violate the injunction, whereas reporting past interactions between the parties  
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1 cannot. (*Id.*) Defendants reply by asking the court to “clarify that speech is not broadly  
 2 enjoined.”<sup>4</sup> (Reply at 3.)

3 Speech is not broadly enjoined. (*See generally* Perm. Inj.) However, this  
 4 determination constitutes a clarification in name only. Whether reporting on or  
 5 discussing foreign Sea Shepherd entities—or any other subject—violates the injunction  
 6 depends on the content and context of the reporting or discussion. The court cannot more  
 7 instructively clarify the scope of the injunction without a concrete dispute before it.

8 2. “Communicating with [f]oreign Sea Shepherd [e]ntities, as long as Defendants  
do not thus direct, incite, or control enjoined conduct”

9 This action also begs the question of content and context. *See supra* § III.C.1.  
 10 Defendants correctly argue that the injunction does not categorically bar them from  
 11 communicating or associating with foreign Sea Shepherd entities. (Mot. at 9.)  
 12 Defendants also acknowledge, however, that the permanent injunction “bars them from  
 13 participating in, directing, inciting, funding, controlling *or* providing material support for  
 14 enjoined activities.” (Reply at 4.) Communication or association with foreign Sea  
 15 Shepherd entities could violate the injunction if, for instance, it materially assists foreign  
 16 Sea Shepherd entities in efforts to violate the injunction. *See Cetacean II*, 774 F.3d at  
 17 948, 952. Accordingly, without a concrete controversy before it, the court is unable to  
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20 <sup>4</sup> (*See also* Reply at 4 (“What Defendants are asking the [c]ourt to clarify is that  
 21 regardless of ‘context,’ the Permanent Injunction does not prohibit speech that discusses,  
 22 encourages, or supports actions by [f]oreign Sea Shepherd [e]ntities, but which does not involve  
 Defendants’ participation in, or direction, incitement or control of, enjoined activities.”).)

1 further clarify the application of the injunction to communication and association with  
2 foreign Sea Shepherd entities.

3. “Partnering with [f]oreign Sea Shepherd [e]ntities on campaigns,  
4 income-generating activities and other projects unrelated to, and kept separate  
from, Southern Ocean whale-protection campaigns”

5 Defendants next ask the court to “clarify that they may collaborate with [f]oreign  
6 Sea Shepherd [e]ntities on campaigns and activities unrelated to the Southern Ocean  
7 whale-protection effort . . . provided that any money or property provided by Defendants  
8 in connection with such campaigns are not used for enjoined activity.” (Mot. at 10.) For  
9 example, Defendants suggest that they might collaborate with foreign Sea Shepherd  
10 entities on drafting environmental protection legislation and protecting baby sea turtles  
11 and vaquita porpoises. (*Id.*) The court agrees that the injunction does not categorically  
12 preclude collaboration with foreign Sea Shepherd entities on projects unrelated to  
13 Southern Ocean whaling. (*See generally* Perm. Inj.)

14 Plaintiffs do not resist this conclusion. (*See* Resp. at 4-5.) Instead, Plaintiffs point  
15 out that their letter, which gave rise to Defendants’ motion, “never mentions  
16 non-Southern Ocean campaigns.” (*Id.* at 5.) Again, the parties’ ships appear to have  
17 passed in the night, and the absence of a concrete controversy renders the court unable to  
18 further clarify the scope of the injunction.

19. “The processing of routine financial transactions by SSCS’s financial partners”

20 Defendants acknowledge that third parties may be held in contempt for knowingly  
21 aiding and abetting an enjoined party’s violation of the injunction. (Mot. at 10-11 (citing  
22 *Peterson*, 140 F.3d 1313, 1323 (9th Cir. 1998); *Goya Foods, Inc. v. Wallack Mgmt. Co.*,

1 290 F.3d 63, 75 (1st Cir. 2002)).) However, they contend that the letters Plaintiffs  
2 recently sent to Defendants' financial service providers, such as PayPal, "suggest that  
3 [Plaintiffs'] goal is to effectively shut down SSCS's operations by threatening its  
4 third-party service providers with contempt liability." (*Id.* at 11; *see also* Davis Decl. Ex.  
5 1.) Defendants therefore ask the court to clarify that unless a financial institution has  
6 knowledge that transactions are intended to fund enjoined actions, facilitating routine  
7 business transactions does not subject financial institutions to contempt liability. (Mot. at  
8 11.)

9 Again, the court can do little to clarify the injunction besides recite the case law  
10 that Defendants provide in their motion. "Federal Rules of Civil Procedure 70 and 71  
11 provide for the enforcement of judgments against non-parties in limited circumstances."  
12 *Peterson*, 140 F.3d at 1323. One such circumstance is when the non-party has  
13 knowledge of an order and abets the defendant in violating the order. *Id.* (quoting *NLRB*  
14 *v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977)); *see also*  
15 *Cetacean II*, 774 F.3d at 949. Plaintiffs have placed PayPal on notice of the injunction  
16 (Davis Decl. Ex. 1), and they appear to have placed other financial institutions on notice  
17 as well (*id.* ¶ 1). However, unless a third party abets Defendants in violating the court's  
18 order or its actions fall under the other "limited circumstances" that courts have  
19 identified, *Peterson*, 140 F.3d at 1323, the third party will not be held in contempt for  
20 violating the injunction. The case law speaks for itself regarding when a financial  
21 institution crosses the line from completing routine transactions to aiding and abetting.

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1 *See, e.g., In re Consol. Meridian Funds*, 485 B.R. 604, 624 (Bankr. W.D. Wash. 2013)  
 2 (collecting cases).

3 5. “Acts that occurred prior to the entry of the Permanent Injunction, including  
 4 SSCS’s 2013 grant of equipment on the Steve Irwin to a [f]oreign Sea  
Shepherd [e]ntity”

5 Finally, Defendants ask the court to clarify that Defendants may not be held in  
 6 contempt for granting equipment aboard the STEVE IRWIN to a foreign Sea Shepherd  
 7 entity. (Mot. at 11-12; *see* Neupert Decl. (Dkt. # 355) ¶ 8, Ex. 6 (“Equip. Grant”) at 1  
 8 (granting the Netherlands-based foreign Sea Shepherd entity the “equipment presently  
 9 associated with the vessel STEVE IRWIN[,] including its boats, tackle, apparel, furniture,  
 10 tools, equipment[,] and all other appurtenances thereto”).) Defendants argue that because  
 11 they granted the equipment on January 12, 2013—before the court entered the permanent  
 12 injunction—they cannot be held in contempt for this action. (Mot. at 11-12; Equip. Grant  
 13 at 1.)

14 Plaintiffs do not dispute that Defendants granted the equipment to the  
 15 Netherlands-based Sea Shepherd entity before the court issued the permanent injunction.  
 16 (*See* Resp. at 6-9.) However, Plaintiffs respond that if foreign Sea Shepherd entities use  
 17 the equipment to commit conduct that violates the injunction, Defendants may be held in  
 18 civil contempt for “providing . . . property” for the purpose of physically attacking or  
 19 dangerously navigating in the presence of Plaintiffs’ vessels. (Perm. Inj. at 2; *see* Resp.  
 20 at 6-7.) Plaintiffs base their argument on the premise that “providing” means “to make  
 21 available,” which “is not limited to a one-time discrete transaction.” (Resp. at 7 (citing  
 22 Random House Dictionary 1556 (unabridged 2d ed. 1987)) (“One can provide or make

1 available something on a continuous basis.”).) Because SSCS retains the right to  
 2 terminate the grant of equipment (Equip. Grant at 3), Plaintiffs contend that Defendants’  
 3 ongoing failure to do so constitutes “providing” that equipment (Resp. at 7-9).

4 The court finds ripe for determination this discrete issue: whether declining to  
 5 terminate the 2013 equipment grant may constitute “providing . . . property” under the  
 6 injunction. (Perm. Inj. at 2:7.) Defendants are presently and continually declining to  
 7 terminate the grant. Plaintiffs posit that as soon as a foreign Sea Shepherd entity uses the  
 8 STEVE IRWIN to violate the injunction, “contempt may lie” for Defendants’ failure to  
 9 terminate the grant. (Resp. at 9.) Defendants therefore properly request clarification at  
 10 this time. *See Cetacean II*, 774 F.3d at 954; *cf. Regal Knitwear*, 324 U.S. at 15 (“No  
 11 concrete case is before us. We have here an abstract controversy over the use of these  
 12 words, and it is as sterile as abstract controversies usually are.”).

13 The court clarifies that declining to terminate the 2013 equipment grant does not  
 14 constitute “providing . . . property.” (Perm. Inj. at 2:7.) Plaintiffs’ position is contrary to  
 15 the plain meaning of “provide.”<sup>5</sup> Indeed, Plaintiffs’ prior usage of “provide” belies the  
 16 interpretation that they now urge. In their first amended and supplemental complaint,  
 17 Plaintiffs alleged that “Defendants have unlawfully and willfully provided or collected  
 18 ‘funds’ in the form of grants or transfers of ships,” including the STEVE IRWIN. (Am.  
 19 Compl. (Dkt. # 234) ¶ 50.3.) If “providing” is ongoing, as Plaintiffs urge the court to  
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 22 <sup>5</sup> Plaintiffs point out that the Random House Dictionary defines “provide” as “to make  
 available.” (Resp. at 7.) Even accepting that definition, it merely begs the question whether  
 “make available” is a one-time act or a continuing act.

1 conclude, Plaintiffs' allegation that Defendants "have . . . provided" funds should be  
2 phrased in the present progressive—"are providing"—rather than the present perfect—a  
3 form of past tense. Plaintiffs also asked the court to enjoin Defendants from "providing  
4 or continuing to provide 'funds' in the form of grants of ships and other assets to foreign  
5 Sea Shepherd entities." (*Id.* ¶ 52.) If "providing" is ongoing, "continuing to provide" is  
6 redundant and superfluous.

7 When the parties negotiated the permanent injunction and the court entered it, both  
8 the parties and the court were aware that Plaintiffs sought to compel Defendants to  
9 revoke the 2013 equipment grant. (*See, e.g., id.* ¶¶ 50.3, 52.) Plaintiffs contend that the  
10 court should therefore infer that the injunction contemplates the 2013 equipment grant.  
11 (Resp. at 8.) Like all products of negotiation, the permanent injunction involved  
12 compromise, so there is no reason to infer that the injunction affords every form of relief  
13 that Plaintiffs sought. Moreover, the court discerns the scope of the permanent injunction  
14 based on the injunction's language, not based on the parties' unwritten intentions. *See*  
15 *Armour*, 402 U.S. at 682; *B2B CFO Partners, LLC v. Kaufman*, No.  
16 CV-09-2158-PHX-JAT, 2012 WL 1067904, at \*3 (D. Ariz. Mar. 29, 2012) (citing *Vertex*  
17 *Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 893 (9th Cir. 1982)). To  
18 impose on Defendants an affirmative obligation to rescind a past action, the injunction  
19 would need to direct such action in clearer terms than the strained interpretation for  
20 which Plaintiffs advocate. *See* Fed. R. Civ. P. 65(d)(1) (requiring that each injunction  
21 "state its terms specifically" and "describe in reasonable detail . . . the act or acts  
22 restrained or required"). Accordingly, based on the plain language of the injunction, the

1 court clarifies that Defendants' failure to terminate the 2013 equipment grant does not  
2 constitute "providing . . . property."

3 **IV. CONCLUSION**

4 Based on the foregoing analysis, the court GRANTS in part and DENIES in part  
5 Defendants' motion to clarify (Dkt. # 352) and clarifies the injunction as explained  
6 herein.

7 Dated this 17 day of March, 2017.

8   
9 JAMES L. ROBART  
10 United States District Judge

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